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DIPLOMATIC PROTECTION

Report of the Working Group

1. The International Law Commission, at its 2534th meeting on 22 May 1998 established an open-ended Working Group, chaired by Mr. M. Bennouna, Special Rapporteur of the topic, to consider possible conclusions which might be drawn on the basis of the discussion as to the approach to the topic and also to provide directions in respect of issues which should be covered in the second report of the Special Rapporteur for the fifty-first session of the Commission.

2. The Working Group held two meetings from 25 to 26 May 1998. As regards the approach to the topic, the Working Group agreed to the following:

(a) The customary law approach to diplomatic protection should form the basis for the work of the Commission on this topic;

(b) The topic will deal with secondary rules of international law relating to diplomatic protection, primary rules shall only be considered when their clarification is essential to providing guidance for a clear formulation of a specific secondary rule;

(c) The exercise of diplomatic protection is the right of the State. In the exercise of this right, the State should take into account the rights and interests of its national for whom it is exercising diplomatic protection;

(d) The work on diplomatic protection should take into account the development of international law in increasing recognition and protection of the rights of individuals and in providing them with more direct and indirect access to international forums to enforce their rights. The Working Group was of the view that the actual and specific effect of such developments, in the context of this topic, should be examined in the light of State practice and insofar as they relate to specific issues involved such as the nationality link requirement;

(e) The discretionary right of the State to exercise diplomatic protection does not prevent it from committing itself to its nationals to exercise such a right. In this context, the Working Group noted that some domestic laws have recognized the right of their nationals to diplomatic protection by their Governments;

(f) The Working Group believed that it would be useful to request Governments to provide the Commission with the most significant national legislation, decisions by domestic courts and State practice relevant to diplomatic protection;

(g) The Working Group recalled the decisions by the Commission at its forty-ninth session, in 1997, to complete the first reading of the topic by the end of the present quinquennium.

3. As regards the second report of the Special Rapporteur, the Working Group suggested that it should concentrate on the issues raised in Chapter One "Basis for diplomatic protection" of the outline proposed by the last year Working Group.